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In the

Supreme Court of the United States

October Term, 1997

JOHN W. THOMPSON; JENNY THOMPSON; JOSEPH N. KARPEN; LEROY BURLING; GLENN THOMPSON; GARY M. KIEDROWSKI; MICHAEL SHEFF; AND ROBERT L. EDMONDS,

Petitioners,

v.

UNITED STATES OF AMERICA; MILLE LACS BAND OF CHIPPEWA INDIANS; ARTHUR GAHBOW; WALTER SUTTON; CARLEEN BENJAMIN; JOSEPH DUNKLEY; ST. CROIX CHIPPEWA INDIANS OF WISCONSIN; LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWAS; BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN; SOKAOGAN CHIPPEWA COMMUNITY, MOLE LAKE BAND, WISCONSIN; RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA; FOND DU LAC BAND OF CHIPPEWA INDIANS; ROBERT PEACOCK; PETER DEFOE; CLIFTON RABIDEAUX; HERMAN WISE; GEORGE DUPUIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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I. INTRODUCTION

Landowners intervened as representatives of individuals who own lands and businesses in the twelve county Minnesota portion of the 1837 ceded territory. These Landowners, like many persons who live and reside in this area, are either dependent upon or impacted by a multi-million dollar hunting and fishing tourism industry.[1] These Landowners have been supported by a widespread, voluntary grassroots fundraising effort to preserve and protect the quality of Minnesota's natural resources so that they can be equally shared by all residents of Minnesota.

While the Bands, in their Opposition to the Petitions, have tried to downplay the impact from this case, thousands of Minnesotans will suffer losses from treaty harvest.[2] The Bands claim that the issues have been settled with finality in Wisconsin for years, after this Court denied review of the Seventh Circuit's decision in Lac Courte Oreilles Band v. Voight, 700 F.2d 341 (7th Cir.1983) cert. den. 464 U.S. 805 (1983)("LCO"). The Bands neglected to tell this Court the full story. After this Court denied certiorari in LCO, Wisconsin was the scene of widespread protests, violence[3],

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[1] Annual tourism spending in the twelve counties directly related to hunting and fishing is $34,620,000.00 with 1,727 employees (LA.10948). References herein to "LA" refer to Landowners' Eighth Circuit Appendix.

[2] Landowners' Economist opined that treaty harvest would cause an annual loss of sales to the tourist industry of $17,300,000.00, and 863 full time jobs. In addition, there would be a $41,200,000.00 loss in property values (LA.10948). Due to the sovereign immunity of the Bands, and the lower courts' dismissal of Landowners' counterclaims against the United States, this economic harm is **irreparable**.

[3] Landowners are neither suggesting nor expecting that violence will result in Minnesota. Landowners, and the local organizations that support them, have not only counseled against the irresponsible and violent conduct that shook Wisconsin in the 1980's, but have intervened in this suit as a constructive way to participate in the resolution of these issues.

arrests and economic downturn.[4] Put simply, this was no quiet matter in Wisconsin, and all stakeholders will benefit if the Court grants certiorari.

II. REASONS FOR GRANTING THE PETITION.

The decisions by the lower courts represent a singular challenge to the authority and direction of this Court in matters of Indian law. The attempt to distinguish this case based on "unique historical facts" is a flaw common to the Respondents' briefs and the lower courts' decisions. When the lower courts could not decide issues presented, issues that would determine the case adverse to the Indian bands, or which would conflict with the analysis of the lower courts on another issue, the lower courts simply declined to address the issues. The failure by the Eighth Circuit to address issues[5] raised by Petitioners does not mean that those issues were not decided; clearly they were decided adversely to the Petitioners.

The Respondents want this Court to get lost in the details of a factual argument designed to draw attention away from the fact that the Eighth Circuit failed to follow clear precedents from this Court. By looking at the factual

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[4] At a treaty harvest averaging 7.5% of the angler harvest in Wisconsin, the Wisconsin tourism industry has suffered continuous annual losses in excess of $10,434,000.00 and 331 jobs. In addition, there has been a loss of property values in excess of $24,800,000.00 (LA.222).

[5] Examples of issues the court did not address are: 1) President Roosevelt's 1938 confirmation of the 1850 Order; 2) the language of the 1855 Treaty's enabling legislation; 3) Congress' ratification of the 1850 Order through appropriation legislation; 4) the undisputed evidence that these Chippewa understood the privilege to only extend to their home areas near their watersheds - none of which are in Minnesota for the six Wisconsin Bands.

minutiae,[6] the larger issues and the controlling precedents of this Court have been missed. This privilege was revoked in 1850 by a Presidential Order (App. 565) under authority explicitly granted from Congress. To eliminate any doubt, the 1855 Treaty ceded all interests in and to land of any kind or nature whatsoever. In the 1889 Nelson Act, 25 Stat. 642, negotiations, the Mille Lacs Band asked about, and was told, that off reservation hunting and fishing was subject to the laws of the Legislature of Minnesota, U.S. v. Minnesota, 466 F.Supp. at 1387. These decisions were reaffirmed numerous times by federal officials.[7] President Roosevelt in 1938 reaffirmed the validity of President Taylor's 1850 revocation order (App. 576).[8] Numerous presidents supported the land survey and sale process, and granted patents to citizens, all inconsistent with the continued existence of the privilege. Minnesota statehood in 1858, under the equal footing

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[6] The historical record, over 150 years old, is at best sketchy and often confusing. Petitioners believe this record, if examined carefully, supports the Petitioners' claims. History should not be rewritten to "remedy a perceived injustice." United States v. Minnesota, 466 F.Supp. 1382 (D.Minn. 1979), aff'd sub nom., Red Lake Band v. Minnesota, 614 F.2d 1161 (8th Cir. 1980), cert. den., 449 U.S. 905 (1980); U.S. v. Choctaw & Chickasaw Nations, 179 U.S. 494,533 (1900). The exclusive forum for historical injustice was created by the Indian Claims Commission Act, 60 Stat. 1049 (1946), Sections 2 and 12 (App. 550-52,555).

[7] In 1920 the Commissioner of Indian Affairs specifically informed the Fond du Lac Band that they must follow state law off reservation (LA.7742). In 1939, when specifically responding to a congressional inquiry regarding the 1837 Treaty privilege, the COIA said that, "outside their reservations . . . they are subject to state laws." (LA.8012; same: LA.7972,7754,7963,8012).

[8] In 1932, 1938 and 1945, the federal government confirmed that the 1850 Executive Order revoked any ability of the bands to hunt or fish on ceded territory to a greater extent than non-band members (LA.7434,7437-7439).

doctrine, eliminated the privilege. The Bands were paid for the full fee value of the lands and waters under the Indian Claims Commission Act's (ICCA's) proceedings. The ICCA's statute of limitations for all claims existing in 1946, which bars this action to set aside a presidential order, is circumvented if the finality and preclusive effect of the Commission's awards are not enforced (App. 555).

III. THE ISSUE IN THIS CASE IS PRIVILEGE REVOCATION, NOT REMOVAL.

Unable to squarely address the nature of the 1837 privilege, both the Eighth Circuit and the Respondents attempt to convert this case into the issue of whether Indian removal could have been, or was, accomplished[9]. Diverting attention from the controlling issue, however, hardly bolsters the strength of Respondents' position.

The 1837 Treaty says **nothing** about limiting the President's power to revoke the privilege based upon removal.[10] Nor is the President's power in the 1837 Treaty

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[9] Removal is a red herring because Indian policy changed between the 1850 Order and the 1854 and 1855 Treaties from a removal policy to the reservation policy. Unquestionably, the Chippewa were "removed" to reservations designed to end "the chase" in 1854 and 1855. Several bands, Fond du Lac, Leech Lake and Gull Lake, who were subject to privilege revocation, did not reside in the 1837 ceded territory, and were not subject to removal. This proves the revocation order was not dependent on removal and revocation was severable. Champlin Mfg. Co. v. Commission, 286 U.S. 210,234 (1932).

[10] This distinguishes LCO. In LCO the Court found that the 1842 treaty (7 Stat. 591) negotiations discussed behavior as a requirement for removal and hunting right revocation. Accordingly, LCO erred by applying this 1842 standard to both the 1842 ceded territory (far northern Wisconsin and Michigan Peninsula) and the 1837 ceded territory (central Wisconsin into central Minnesota). There is no need to compound this error by repetition. The 1983 LCO decision was based upon a scant summary judgment record, relying heavily on the memoirs of Benjamin

limited by Indian understanding.[11] Congress in the 1837 Treaty delegated the power to decide the duration of the privilege to the President, not the federal courts.[12] Supreme Court review is warranted when lower courts reject the unanimous decisions of every President who considered the issue. Congress, through the 1837 Treaty, unambiguously limited the privilege: "during the pleasure of the President." President Taylor, in revoking, referred to the privilege as "temporary" (App.565); Hagen v. Utah, 510 U.S. 399,411 (1994). The proper analysis of presidential power under Dalton v. Specter, 511 U.S.462 (1994) leads to one conclusion: the federal courts should not override presidential orders unless unconstitutional.

> [W]here a statute . . . commits decision making to the discretion of the President, judicial review of the President's decision is not available.

Dalton, 511 U.S. at 477. This is particularly true in Indian affairs where Congress exercises plenary power.

Armstrong, which were described as "low quality" (LCO 700 F.2d at 356), evidence rejected by even the Band's experts in this case (LA. 3589), and it "may not be . . . very reliable." App. 263, Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F.Supp. 784,807 (D.Minn. 1994).

[11] The Northwest Ordinance, and any duty of good faith flowing from it, have been held to be inapplicable to the exercise of the President's discretion to revoke hunting and fishing rights. Menominee Indian Tribe v. Thompson, 922 F.Supp. 184,206 (W.D.Wis. 1996); Compare, Choctaw & Chickasaw Nations, 179 U.S. at 533-34.

[12] Choctaw & Chickasaw Nations, 179 U.S. 532-36.

IV. PETITIONERS' CLAIMS ARE NOT CONSTRAINED BY A "CONSERVATION NECESSITY" STANDARD.

Respondents take the clever tact of attempting to pigeonhole their response to the Landowners' claims[13] as unworthy of further court attention, erroneously argued as subsumed under the "conservation necessity" standard. The Bands' argument exposes its source: the dissent in Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985).[14]

No flaw is greater than the attempt to recast this hunting and fishing privilege from "an interest in and to land," to an "immunity" from state regulation contrary to this court's decisions in Klamath; Kennedy v. Becker, 241 U.S. 556 (1916) and North American Comm. Co. v. U.S., 171 U.S. 110,137 (1898).

The 1855 Treaty relinquished "all interests in and to land", and to avoid Klamath, the district court adopted an analysis that this treaty privilege must be something new, an immunity from law. This is the same argument advanced by the Klamath Tribe to the United States Supreme Court:

> "[T]he Red Lake court made no distinction between the right to hunt and fish free of state regulation (a

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[13] These claims involve the ICCA; characterizing the privilege as an "immunity"; and failing to distinguish a "privilege" from a "right."

[14] In Judge Marshall's Klamath dissent, he stated that, "a state must demonstrate that its regulation is reasonable and [a] necessary conservation measure. . . ." Klamath, 473 U.S. at 780 n.4 (dissent)(citing, Antione v. Washington, 420 U.S. at 207,n.11; and Tulee v. Washington, 315 U.S. 681 (1942)). The Eighth Circuit's decision is contrary to Klamath, and the Seventh Circuit's decision in LCO, 700 F.2d 341 (7th Cir. 1983), decided before Klamath, Dalton and Hagen, provides no precedential value.

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> regulatory right) and the right to enter upon private land to hunt and fish over the landowners' objection (a property right). Indeed, the entire Red Lake analysis is premised on the characterization of the property right asserted by the Indians as an interest in property . . .. As the tribe has demonstrated, however, Indian hunting and fishing rights are a hybrid mixture of proprietary and jurisdictional interests and thus a right to hunt and fish free of state regulation is a right separate and apart from an interest in the property itself.

(Klamath Tribe's Brief id., La.8668 [emphasis added]). That argument was wrong then, and it is wrong now.

A privilege to hunt and fish can be held separate from land ownership, but that argument is a diversion. Full fee title includes all rights, easements and profits a prendre, including a privilege to hunt and fish. If the Eighth Circuit's decision stands, other courts will analyze hunting and fishing rights as an immunity, eschewing Klamath's directive that the general language of cession and conveyance cedes all remnants of Indian or recognized title, including hunting and fishing rights. In South Dakota v. Yankton Sioux Tribe, 522 U.S. ____, 118 S.Ct.789 (1998), the Court found that the tribe lacked regulatory and adjudicatory authority over lands that have been sold. Once all interests in and to land are conveyed,[15] the treaty privilege was conveyed and lost.

Properly analyzing the privilege as a revocable license, as an interest in or to land, implicates: the 1855 Treaty, the 1889 Nelson Act, and the Land Patenting defense (Petition, pp.8-9).

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[15] This court has repeatedly said that treaties were drawn with the common law and real property concepts in mind. The treaty drafters understood "the modes and forms of creating the various technical estates known to their law . . . ." Jones v. Meehan, 175 U.S. 1,11 (1899).

Three factors confirm this privilege was tenuous and precarious, and subject to Minnesota's laws upon statehood under Ward v. Racehorse, 163 U.S. 504 (1896), like the treaty right at issue in Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995) cert. den. 116 S.Ct. 1851 (1996). First, a "temporary" revocable license is terminable at will. Second, subsequent conveyance terminates the license. Third, the lower courts' holding that the privilege was lost or "extinguished" on private lands is equivalent to the loss upon occupation standard in Crow Tribe.[16] The Seventh, Eighth and Tenth Circuits are in conflict.

V. THE INDIAN CLAIMS COMMISSION ACT AND THE $9 MILLION ICC AWARD BAR THE BANDS' CLAIMS.

The purpose of the ICCA was to bring finality to all Indian claims then in existence (App.555). Respondents fail to come to grips with this key issue: they cannot sue another party to accomplish indirectly what they cannot do directly - bring suit against the United States to set aside the Presidential Order of 1850.

The Indian Claims Commission (ICC) quickly decided that the appropriate and sole remedy would be damages.[17]

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[16] The Crow Treaty contained a "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Crow, 73 F.3d at 985,86. If anything, a privilege "during the pleasure of the President" is much more precarious and less certain of "continuing" than the hunting right in Crow. See, LCO, 760 F.2d 177,182 (7th Cir. 1985); Mille Lac, App.71,338.

[17] "Indeed, election of remedies is often legislatively prescribed." Hathey v. Linn County, 924 F.2d 1512,1518 (9th Cir. 1991). Since damages have been paid, the election of remedies' doctrine bars the bands' claims for injunctive relief. See, Taylor v. Burlington N.R.R., 787 F.2d 1309,1317 (9th Cir. 1986); Winfield Ins. v. Edward LeRoux Group, Inc.,

The highest and best use valuation method based on timber was advocated by the Bands' ICC expert appraiser (LA. 3873) and he appraised the value of the lands and waters based upon "full fee title" (LA. 3875). The bands elected their remedy by participating in the ICC proceeding, and receiving full payment based upon full fee value. It was incumbent upon these Respondents to request an offset to preserve the privilege, but the bands did not despite extensive pleadings on other offsetting matters (LA. 4028-39,3777).

The Chippewa Bands knew the 1837 privilege had been denied by Presidents, the Commissioner of Indian Affairs, and Minnesota prior to the 1946 ICCA. The Bands' initial petitions specifically affirmed the loss of the temporary privilege. This claim was known, existing, and lost under Section 12 of the ICCA (App.555) as well as by payment. The Ninth Circuit and Klamath conflict with the Eighth Circuit's analysis of the impact of an ICC payment on subsequent claims under the same treaty.[18]

The Ninth Circuit's courts have consistently applied the ruling from United States v. Dann, 873 F.2d 1189,1199 (9th Cir.) (1989) cert. den. 493 U.S. 890 (1989) "that 'payment of [a] claims award establishes conclusively that a taking occurred' even though the claim was not actually litigated" Dept. of Ecology v. Yakima Reservation IRR. Dist., 850 P.2d 1306,1324 (Wa. 1993)(en banc); Havasupai Tribe v. U. S., 752 F.Supp. 1471,1478-9 (D.Ariz. 1990). In Western Shoshone Nat. Council v. Molini, 951 F.2d 200,203-204 (9th Cir. 1991) the court applied Klamath when ruling that treaty reserved hunting and fishing rights, as well as those flowing from aboriginal title, are lost by an ICC payment. Id.

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896 F.2d 483,488 (11th Cir. 1990); Lane v. Peterson, 899 F.2d 737,744 (8th Cir. 1990).

[18] The ICCA issues were not litigated in the Seventh Circuit's LCO decisions, further distinguishing that case.

If the Petition is denied, tribes will be able to pick state defendants, and commence a new round of litigation seeking specific performance giving them hunting and fishing rights over lands and waters for which they have already received full fee payment without offset.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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